91-837

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

UNITED STATES OF AMERICA,
Respondent
v.
GERALD KRESS,
Petitioner

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a criminal sentence ordering restitution under the Victim and Witness Protection Act and imposing interest thereon at the punitive rate of 18%, to accrue from the date of sentencing, violates due process by imposing an impermissible burden on defendant's right to appeal?

2. Whether the Court of Appeals erred in holding that the defendant was barred by *res judicata* from challenging the District Court's denial of its Motion under Rule 35 of the Federal Rules of Criminal Procedure, where the District Court had never ruled on defendant's prior Rule 35 Motion and where this Court, in *Heflin v. United States*, 358 U. S. 415 (1959), held that *res judicata* does not apply to Rule 35 motions?

LIST OF ALL PARTIES

The parties in interest in this proceeding are those named in the caption of this Petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

OTHER AUTHORITIES:

REFERENCE TO OPINIONS OF COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, No. 91-1237, has been reported at 944 F.2d 155. The District Court's Order of March 8, 1991 was not accompanied by an opinion. Copies of the Opinion and Orders below are attached hereto in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 16, 1991. A timely Petition for Rehearing was denied by Order of the Court dated October 18, 1991.

This Court has jurisdiction to review the judgment of the Court of Appeals for the Third Circuit by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Victim and Witness Protection Act, 18 U.S.C. § 3663-64 (1988):

§ 3663. Order of Restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

* * *

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made

before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in-

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than-

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

* * *

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of probation or a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation or a term of supervised release, modify the term or conditions of probation or supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced-

(1) by the United States-

(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title; or

(B) in the same manner as a judgment in a civil action; and

(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

§ 3664. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, *shall consider* the *amount of the loss* sustained by any victim as a result of the offense, the *financial resources* of the defendant, the *financial needs* and *earning ability* of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

* * *

(e) A conviction of a defendant for an offense involving the act giving rise to restitution under this section shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with the State law, brought by the victim.

Former 18 U.S.C. § 3565.
Collection and payment of fines and penalties[1]

* * *

(2) If the judgment specifies other than immediate payment of a fine or penalty, the period provided for payment shall not exceed five years, excluding any period served by the defendant as imprisonment for the offense. The defendant shall pay interest on any amount payment of which

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[1] Repealed by Pub.L. 98-473, effective November 1, 1986, but applicable to offenses committed prior to that date.

is deferred under this paragraph. The interest shall be computed on the unpaid balance at the rate of 1.5 percent per month for each full calendar month for which such amount is unpaid.

* * *

(c)(1) The defendant shall pay interest on any amount of a fine or penalty (other than a penalty under paragraph (2) of this subsection) that is past due. The interest shall be computed on the unpaid balance at the rate of 1.5 percent per month.

28 U.S.C. § 1961. Interest

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

* * *

STATEMENT OF THE CASE AND BASIS OF FEDERAL JURISDICTION

On July 13, 1988, defendant/petitioner Gerald Kress, together with co-defendants Educational Development Network Corporation ("EDN") and Col. Robert Allen Baxter, were charged in a sixty-four count indictment, alleging fraud and payment of gratuities in connection with EDN's Career Planning Workshop contract for recruitment with the Army National Guard. The indictment charged multiple counts of mail fraud, 18 U.S.C. § 1341; false statements to a government agency, 18 U.S.C. § 1001; filing false claims, 18 U.S.C. § 287; and paying gratuities to a public official, 18 U.S.C. § 201(f). Jurisdiction in the District Court was based upon 18 U.S.C. § 3231.

Following the District Court's denial of defendants' Motion to Compel the Production of Discovery and Motion for Suppression of Documents, defendants EDN and Kress entered into a plea agreement with the government on November 29, 1988. The defendants agreed to enter conditional guilty pleas pursuant to Fed. R. Crim. Pro. 11(a)(2) to all counts of the indictment against them, in exchange for which they received the right to appeal from the judgment of conviction, to seek specific review of the District Court's adverse determinations of the defendants' two pre-trial motions. The conditional pleas were accepted by the court and the pleas were entered on November 29, 1988.

On March 14, 1989, defendants Kress and EDN appeared before the District Court for entry of the judgment of conviction against them and for sentencing. The court sentenced Gerald Kress to a term of imprisonment for one year

and one day and to a probationary period of five years to commence upon his release from confinement. The court made the following findings and orders with respect to the payment of restitution to the United States:

> The Court has considered the imposition of restitution in this case and has determined that an order of restitution is appropriate. This Court finds that the United States was an aggrieved party which has suffered actual damage or loss which was caused by the offenses for which Defendant has pleaded guilty. The Court further finds pursuant to the agreement of the Defendant and the Government that the value of the damage or loss to the United States is THREE HUNDRED THOUSAND DOLLARS ($300,000.00). Based upon the financial information presented to the Court not just in the presentence report but in other testimony received at the sentencing hearing the Court makes a finding that the Defendant has the financial capacity to pay the restitution, the amount of which was heretofore stated, within the probation period which the Court will impose on Count Two.
>
> On Count TWO, imposition of sentence as to imprisonment only is suspended and Defendant is placed on probation for a period of FIVE (5) YEARS, to commence upon the Defendant's release from confinement ordered on Count One and subject to the following terms and conditions: (1) Defendant shall make restitution

> to the United States in the amount of THREE HUNDRED THOUSAND DOLLARS ($300,000.00) in sixty (60) monthly payments of Five Thousand Dollars ($5,000.00) each until such amount is paid in full together with interest on the unpaid balance from March 14, 1989 computed at the rate of 1.5% per month as provided in 18 United States Code § 3565.

Defendant Kress was further ordered as a condition of probation to perform community service and to pay a special assessment of $1,400, or $50 for each count to which he pled guilty. Defendant EDN, which was wholly owned by Gerald Kress, was ordered to pay a fine in the amount of $100,000 and a special assessment of $4,800.

Kress and EDN filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit from the judgment of conviction on March 22, 1989. Defendant Kress was granted bail pending his appeal. Gerald Kress and EDN paid their special assessments on March 14, 1989 and March 15, 1989 respectively and EDN paid its $100,000 fine, plus accrued interest, in full on March 31, 1989.

On April 14, 1989, defendant Gerald Kress filed a Motion to Reduce or Modify Sentence pursuant to Rule 35, Fed. R. Crim. Pro. The Motion challenged the 18% annual rate of interest imposed on the $300,000 restitution. The Motion requested that the interest rate on the restitution ordered be changed to the rate of interest allowed on civil judgments pursuant to 28 U.S.C. § 1961, which was at that time 10.43%.

On June 5, 1989, the District Court entered an Amended Judgment, vacating its judgment of March 14, 1989 and reducing the period of incarceration of Mr. Kress from a year and a day to four months. The Court's Order stated that the Court's intention had been that the defendant be eligible for parole after serving four months, and it was amending its Judgment to make certain that intention was effectuated.

The Court never addressed or ruled on defendant's Rule 35 Motion regarding the preprobation interest on the restitution.

Mr. Kress formally withdrew his Rule 35 Motion without prejudice on June 20, 1989.

The judgment of conviction of defendants EDN and Kress was affirmed by the Court of Appeals for the Third Circuit on December 18, 1989. Defendants filed a timely Petition for Certiorari to the United States Supreme Court, and bail was continued for defendant Kress while the Petition was pending. This Court denied certiorari on April 16, 1990.

On April 19, 1990, defendant Kress filed a Motion for Reduction and Modification of Sentence pursuant to Federal Rule of Criminal Procedure 35(b), requesting that (1) the court's order of restitution be set aside in light of a post-sentencing civil action filed by the United States against Gerald Kress and EDN claiming approximately $6.5 million dollars in compensatory damages and penalties arising out of

the acts charged in the indictment;[2] and (2) a proposed additional community service project be made another condition of Mr. Kress' probation and be substituted for the four months of incarceration ordered by the court. That Motion was denied by the District Court on May 22, 1990 and defendant Kress was ordered to report for his term of incarceration on June 22, 1990.

Mr. Kress was released from prison on October 2, 1990. Prior to his release, he requested clarification from the District Court of the probation terms of the court's sentencing order, to resolve what appeared to be an ambiguity as to whether the interest would accrue from the date of the order or only on restitution which was past due. The court did not respond to defendant's letter request for a clarification of the terms. Subsequently, defendant filed a Motion for Modification of Conditions of Probation,[3] requesting that the court clarify or, in the alternative, modify its sentencing order to reflect that the restitution payment, ordered as a condition of probation, was not due until probation actually began, and that therefore no interest was due thereon. The Motion stated that the United States Attorney had made demand upon Mr. Kress to pay pre-probation interest in the amount of approximately $95,000.

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2 *United States of America v. EDN Corp., Gerald Kress and Robert Allen Baxter*, Civil Action No. 89-7780, United States District Court for the Eastern District of Pennsylvania.

3 The Motion, although denominated as one under Rule 32.1 of the Criminal Rules, was treated as one under Rule 35 challenging an illegal sentence.

The District Court denied defendant's Motion by Order entered March 12, 1991. Mr. Kress appealed.

The Third Circuit Court of Appeals affirmed. First, the Court held, citing its prior holding in *United States v. Sleight*, 808 F.2d 1012, 1019 (3rd Cir. 1987), which held that interest was permissible on a restitution award under the Federal Probation Act (FPA), 18 U.S.C. § 3651, that the same result would obtain under the Victim and Witness Protection Act (VWPA), 18 U.S.C. § 3663-64 (1988) (formerly 18 U.S.C. § 3579-80 (1982).

The Court of Appeals then turned to the issue of whether or not the interest could begin to accrue before the probation period begins, upon release from prison. The Court held that it could begin at the date of sentencing (March 14, 1989), which in this case preceded the commencement of probation (October 2, 1990) by approximately 18-1/2 months due in large part to the course of the appeal on the merits, during which the defendant Kress was free on bail. The period from March 22, 1989, the date that defendants filed their notice of appeal from the District Court's judgment of conviction, to April 11, 1990, the date of this Court's denial of their application for a Writ of Certiorari, is almost 13 months.

The Court of Appeals then considered the question of the rate of interest. It held that because an earlier motion had been presented to the District Court asking for a reduction in the rate, referring to the April 1989 motion discussed above, the defendant was barred by *res judicata* from raising that issue on the appeal from which this Petition for Certiorari is filed.

The government had not raised that argument in its brief before the Court of Appeals and for that reason it had not been addressed by either party. In fact, however, the District Court had never ruled on the earlier motion filed to reduce the interest rate, as explained above. Nowhere in the docket is there any indication of such a ruling.

Finally, the Court of Appeals turned to the issue of whether or not the Order of the District Court impermissibly burdened defendant's right to appeal. The Court acknowledged that the government cannot punish a defendant for appealing his case or otherwise restrict his avenues of appeal, but held that Kress had not brought this issue to the attention of the District Court and therefore that he could secure relief only if the District Court committed a plain error. In fact, Kress' Motion leading to this appeal sought to have the interest aspect of the sentence overturned on the ground that it unfairly prejudiced him.

The Court nevertheless considered whether or not, under the plain error doctrine, the District Court had erred. It held that the District Court had not erred because it had found that Kress could afford to pay the $300,000 restitution and could afford to pay 18% interest. (Slip Opinion at 18.) The Court did not address directly the argument that imposition of a penalty interest rate of 18% constituted an impermissible burden on defendant's right to appeal, nor did it explain how a finding that defendant could afford to pay the restitution and interest, if required to do so, rebutted that argument.

On September 30, 1991, defendant filed a petition for rehearing, which was denied on October 18, 1991.

REASONS FOR GRANTING THE WRIT

A. A Writ of Certiorari Should Issue To Determine If The Practice Of Assessing Interest At The Above Market, Punitive Rate of 18% On Orders Of Restitution In Criminal Cases Under The Victim And Witness Protection Act Constitutes A Violation of Due Process In That It Burdens a Criminal Defendant's Right Of Appeal.

Under the due process clause the government cannot punish or otherwise restrict the right of appeal of a criminal defendant. *See generally North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); *Reisman v. Caplin* 375 U.S. 440 (1964); *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920); *St. Louis Iron Mountain and Southern Railway Co. v. Williams*, 251 U.S. 63 (1919); *Ex Parte Young*, 209 U.S. 123 (1908). As the Court of Appeals noted in this case, "[t]o do so constitutes a violation of due process." (Slip opinion at 18.)

The terms of Mr. Kress' sentence resulted in just such a due process violation. The District Court's imposition of a punitive rate of interest on a criminal restitution award created a severe impediment upon the defendant's exercise of his right to appeal his conviction in that it resulted in a far

greater penalty on defendant simply because he took an appeal than it would have if he had not appealed.

During the thirteen months in which Mr. Kress pursued his appeal on this matter, interest at 18% was accruing on the restitution amount. One might argue that the interest was imposed simply to compensate the victim, in this case the government, for the delay in payment from the time of assessment of the damages, i.e. the sentencing, to the later payment. Such interest would be well within the civil law's traditions of allowing post judgment interest on a civil judgment. *See, e.g.*, 28 U.S.C. § 1961. As this Court noted in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S.Ct. 1570 (1990), "the purpose of post judgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." 110 S.Ct. at 1576, quoting *Poleto v. Consolidated Rail Corp.*, 826 F.2d at 1280 (3d Cir. 1987).

However, the practice used here of awarding interest at an above market rate is designed to go well beyond the need to compensate victims for delayed payment. It instead provides them a windfall and imposes a penalty keyed to the defendant's exercise of his right to appeal. Congress' purpose in enacting the Victim and Witness Protection Act was plainly to permit criminal sentencing courts to include restitution as part of a criminal sentence. Courts have read its provisions broadly to permit an award of restitution for all consequential damages suffered by crime victims. See, e.g. *United States v. Hand*, 863 F.2d 1100 (3d Cir. 1988); *United States v. Brown*, 744 F.2d 905 (2d Cir. 1984) *cert. denied*, 469 U. S. 1089 (1984). Indeed, the current trend in the federal criminal law

is towards even more use of restitution. The Federal Sentencing Guidelines now require that restitution be ordered, subject to the provisions of the VWPA, for all convictions under the Criminal Code, Title 18, and certain other criminal violations. See United States Sentencing Commission, *Guidelines Manual*, §§ 5E1.1; 8 B1.1.

That Congressional purpose of providing restitutionary relief to victims of crime was cited by the Court of Appeals as a reason for its decision that interest, although not expressly dealt with in the VWPA, was appropriate. Similar reasons were relied upon by the Fifth Circuit in *United States v. Rochester*, 898 F.2d 971 (5th Cir. 1990), when it reached the same result.

The Constitutional infirmity under the due process clause arises when the general proposition that interest is appropriate on awards of restitution is implemented in an Order using an interest rate of 18%, which is an above market rate unnecessary to compensate a victim for loss of the use of the funds. When, as here, the District Court, in applying the VWPA, found that the entire loss to the government was $300,000 and required that *all* that loss be paid by the defendant, to the degree that the victim collects interest over that necessary to compensate it for delay at market conditions, the victim is getting a *premium* because of defendant's appeal. To the degree that a defendant has to pay such a premium the interest award amounts to additional silent punishment, in excess of that allowed by the applicable sentencing statute. This is not only inconsistent with due process standards, but also violates *Hughey v. United States*, 495 U.S. 411, 110 S. Ct. 1979 (1990), which held that "loss caused by the conduct underlying the offense of conviction establishes the outer limits

of a restitution order." 495 U.S. at ___, 110 S. Ct. at 1984.

For these reasons, we believe that the practice utilized by the District Court here presents a critical issue in the administration of criminal law throughout the federal judicial system. It is important that this Court consider the ramifications of the award of above market interest and its effect on the due process rights of defendants to appeal. Accordingly, Petitioner respectfully requests this Court to issue a Writ of Certiorari to the Court of Appeals for the Third Circuit.

B. **A Writ Of Certiorari Should Be Granted, Because The Court Of Appeals' Holding That *Res Judicata* Applies To Rulings Under Rule 35 Of The Federal Rules Of Criminal Procedure Is Inconsistent With This Court's Decision In *Heflin v. United States*.**

The Court of Appeals decided that it would not consider defendant's argument that the rate of interest should be reduced because, it held, defendant is barred by *res judicata* because of the District Court's June 5, 1989 Order.

The correctness of the Panel's decision as to that issue depends on two conclusions it reached: first, that the June 5, 1989 Order of the District Court represented a ruling on the merits of the April 14, 1989 Rule 35 Motion; and, second, that assuming it was, defendant is barred from raising

that issue again by *res judicata*. Petitioner submits that both conclusions are incorrect.

1. The District Court Did Not Rule On Defendant's April 1989 Rule 35 Motion.

The first conclusion is incorrect because the Court of Appeals simply ignored the fact that no Order exists which disposes of the defendant's April 1989 Rule 35 Motion as to interest.

The June 5th Order had to do only with the length of defendant's incarceration, an issue not raised in the April 1989 Motion. The Court made absolutely no indication in its Order of June 5th, explicitly or implicitly, that it was ruling on the subject raised by the Rule 35 Motion.

For that reason, the factual predicate of the Court of Appeals' decision to the effect that the District Court had already ruled in 1989 on the interest rate issue and no appeal was taken from the ruling is simply incorrect.

2. The Court of Appeals' Decision Is Inconsistent With *Heflin v. United States*.

The decision of the Court of Appeals also is incorrect because it is inconsistent with the decision of this Court in *Heflin v. United States*, 358 U.S. 415 (1959). That case squarely establishes the principle that a defendant under

the former Rule 35[4] applicable to this case is free to file successive motions raising identical issues under Rule 35. *Heflin* involved a sentencing under the Federal Bank Robbery Act, 18 U.S. § 2113, in the wake of *Prince v. United States*, 352 U.S. 322 (1957), which held that multiple sentences on multiple convictions under the Bank Robbery Act growing out a single bank robbery, even if concurrent, are illegal. The appellant in *Heflin* was convicted of three counts of violation of the Federal Bank Robbery Act arising out of a single bank robbery. Shortly after the decision in *Prince v. United States* was announced, he instituted a proceeding under 28 U.S.C. § 2255 complaining that he could not lawfully be convicted under two separate subsections of the Federal Bank Robbery Act. The District Court denied the Motion, and the Court of Appeals affirmed the District Court. The Supreme Court reversed.

The procedural aspect of the case is the relevant one to this appeal. Justice Douglas, writing for a unanimous Court noted that because the appellant was at the time of the § 2255 proceeding serving a sentence which he did not contend was illegal - since it was the sentence imposed on the one admittedly valid conviction under one section of the Bank Robbery Act - a majority of the Supreme Court, albeit not Justice Douglas himself, felt that §2255 was therefore unavailable as a vehicle to challenge the validity of the sentence since that statute is available only to attack a sentence

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[4] Since this case began, Rule 35 has been amended.

under which a prisoner is in custody.[5] However, that same majority of the Court felt that notwithstanding that problem, Rule 35 was available to the petitioner to challenge what was in effect an illegal sentence. The procedural difficulty, according to Justice Douglas, was that if the district court's ruling was treated as one on a Rule 35 Motion, then the petition for certiorari had not been filed within the appropriate time period.

Nevertheless, the Court reached the issue. As Justice Douglas explained, "*because successive motions may be made under Rule 35* and because no jurisdictional statute is involved, the majority agrees to dispense with the requirements of our Rule in order to avoid wasteful circuitry." 358 U.S. 415, at 418, n. 7 (emphasis added). Justice Douglas stated that although the technically correct solution was to dismiss the appeal, the Court would not do that. He reasoned that since the defendant could simply go back again to the district court, file an *identical* Rule 35 motion before the district court, only to have that court and the court of appeals reach the same result and end up back again in the Supreme Court, the Court would dispense with its rule and reach the merits.

The only way that Justice Douglas', and the Court's reasoning makes any sense is if the Supreme Court was of the view that the successive identical motion option was available to a defendant under Rule 35. That is, a criminal defendant, utilizing Rule 35, may make successive motions raising the identical issue without any res judicata bar. That

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[5] This view was explained in a concurring opinion in which five members of the Court joined.

may not be a fruitful tactic to follow for obvious reasons, but, it is nevertheless something that can be done under the teaching of the *Heflin* case. Accordingly, the Court of Appeals' decision that defendant is barred because the district court had considered the issue in a previous Motion and ruled on it in its June 5, 1989 Order is inconsistent with this Court's decision.

There are in similar contexts devices to avoid the burden of successive identical motions such as those used to deal with successive §2255 proceedings, which are not barred by res judicata. *See Sanders v. United States*, 373 U.S. 1 (1963). We do not suggest here that the Court adopt *Sanders* as being applicable to Rule 35 motions but merely point out that a holding that *res judicata* does not apply to Rule 35 and is not only required by *Heflin*, but is also consistent with sound policy recognized in *Sanders* and will not necessarily result in problems associated with abusive use of repetitive motions.

The Court should grant a writ of certiorari to correct the decision of the Third Circuit Court of Appeals which is inconsistent with this Court's decision and to consider, in conjunction with that issue, whether the issue of successive motions under Rule 35 of the Federal Rule should

be dealt with under the procedure set out in *Sanders v. United States*, 373 U.S. 1 (1963) or otherwise.

Respectfully submitted,

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Filed September 16, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1237

UNITED STATES OF AMERICA
v.
GERALD KRESS,

Appellant

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Cr. No. 88-00271-02)

Argued August 15, 1991

BEFORE: COWEN, NYGAARD and
WEIS Circuit Judges
(Filed September 16, 1991)

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OPINION OF THE COURT

COWEN, Circuit Judge.

The issue presented by this appeal is whether a district court may properly require a criminal defendant to pay post-judgment interest on restitution due the United States government as a condition of probation, when that interest accrues from the day of sentencing at a monthly rate of one-and-one-half percent. Because we hold that the Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3663-64 (1988) (formerly 18 U.S.C. §§ 3579-80 (1982)), permits federal courts to order a defendant to pay post-judgment interest of this nature, we will affirm.

I.

For his role in a scheme to defraud the United States Department of Defense, Gerald Kress was sentenced on March 14, 1989, to a prison term of 366 days followed

by five years of probation.[1] In addition, the district court determined that Kress could afford to compensate the United States for losses it suffered as a result of his wrongdoing, and ordered Kress to pay the government $300,000.00 in restitution as a condition of his probation. The $300,000 was payable in sixty monthly installments, with payment to begin upon the commencement of his probation. Interest on the unpaid balance was to begin accruing immediately and was to be "computed at the rate of 1.5% per month as provided in 18 U.S.C. § 3565." App. at 46a. While the district court explained the basis for setting the interest rate at 18% annually, it did not specify the statutory authorization for requiring that interest be paid in the first place.

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[1] Kress, Educational Development Network Corp. ("EDN"), which is a corporation wholly owned by Kress, and Colonel Robert Allen Baxter were indicted on sixty-four counts of fraud in connection with a contract between EDN and the Department of Defense to provide an educational and employment training program to the Army National Guard Bureau. Kress was charged with thirteen counts of mail fraud, 18 U.S.C. § 1341, twenty counts of making false statements to a government agency, 18 U.S.C. § 1001, twenty-one counts of filing false claims, 18 U.S.C. § 287, and five counts of paying gratuities to a public official, 18 U.S.C. § 201(f). After two pre-trial motions were denied, Kress negotiated a plea agreement with the government. Pursuant to Fed. R. Crim. P. 11(a)(2), Kress entered a conditional plea of guilty to all counts against him, but expressly reserved his right to appeal the judgment of conviction as well as the district court's disposition of the two pre-trial motions he filed.

Kress thereafter appealed the judgment of conviction. He also filed on April 14, 1989, a Rule 35 motion to reduce or modify his sentence. Fed. R. Crim. P. 35.[2] At the center of Kress's motion was a request that the interest rate on the restitution be reduced to 10.43% annually, which corresponded to the rate of interest allowed on civil judgments at the time, 28 U.S.C. § 1961. On June 5, 1989, the district court vacated the 366 day prison term, substituting a four month term of imprisonment. The rest of the sentence, including the requirement of restitution and interest, was left unchanged. Following our affirmance of the Kress conviction, *United States v. Educational Development Network Corp.*, 884 F.2d 737 (3d Cir. 1989), the United States Supreme Court denied certiorari on April 16, 1990.

Another Rule 35 motion was filed by Kress on April 19, 1990, which the district court subsequently denied. Kress then served his prison term and was released on October 2, 1990. After his release, Kress filed a Motion for Modification of Conditions of Probation under Rule 32.1(b). Building on the premise that he was given an illegal sentence, Kress requested that the sentencing order be clarified or modified to reflect that interest on the restitution payments did not start to accrue until Kress's release from

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[2] Offenses committed prior to November 1, 1987 are governed by the former version of Rule 35 which permitted the correction of an illegal sentence at any time. That provision was changed by amendment in 1986. Pub.L. 98-473, Title II, § 215(b), 98 Stat. 2015.

prison.[3] On March 12, 1991, the district court denied the motion, prompting Kress to file this appeal.

II.

Subject matter jurisdiction over this matter was properly invoked pursuant to 18 U.S.C. § 3563(c) and Fed. R. Crim. P. 32.1(b). Our jurisdiction is predicated on 28 U.S.C. § 1291, 18 U.S.C. § 3742(a)(1), and Fed. R. Crim. P. 35(a).[4] Since the legality of the sentence imposed by the district court is being challenged, our review is plenary. *See United States v. Fredenburgh,* 602 F.2d 1143, 1148 (3d Cir. 1979), *overruled on other grounds, United States v. Busic,* 639 F.2d 940 (1981).

This case presents several questions of first impression in our circuit. Initially, we must decide if a

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[3] The Motion states that the United States Attorney had demanded that Kress pay pre-probation interest totalling approximately $95,000.

[4] This is ostensibly an appeal from the district court's denial of a Rule 32.1(b) motion. Rule 32.1(b) motions, though, are vehicles for modifying conditions of probation when changing circumstances warrant it, or when terms in the order are unclear. Kress's Rule 32.1(b) motion, on the other hand, directly challenged the legality of the sentencing order, and cannot be termed a Rule 32.1(b) motion. Instead we think it is more properly titled a Rule 35(a) motion, and we will view it as such. *See United States v. Heubel,* 864 F.2d 1104, 1109 (3d Cir. 1989) (holding in a *pro se* case that a motion denominated as a Rule 35(b) motion may be treated as a Rule 35(a) motion). Our jurisdiction, then, is based on Rule 35(a), not Rule 32.1(b).

district court may properly order a criminal defendant to pay post-judgment interest on restitution owed to the victim of his crimes. Should we hold that it may, we must then determine if the interest can accrue from the date that the sentencing order is entered. We must also ascertain whether Kress, having failed to appeal from the district court's order of June 5, 1989, is now barred from relitigating the issue of the appropriate interest rate. Finally, we must decide if the interest requirement unconstitutionally burdens a defendant's right to appeal.

Before addressing these questions, we need to frame our analysis. The district court unfortunately did not point to any authority sanctioning the restitution portion of its sentencing order. Nevertheless, a pair of congressional acts clearly permitted it to order Kress to pay restitution to the government as a condition of probation. The first of these is the Federal Probation Act (FPA), 18 U.S.C. § 3651,[5] which was repealed in 1984 but still applies to crimes committed before November 1, 1987. *See* Pub. L. 98-473, Title II, ch. II, § 212(a) (2), Oct. 12, 1984, 98 Stat. 1987 (repealing 18 U.S.C. § 3651); Pub. L. 98-473, Title II, ch. II, § 235, Oct. 12, 1984, 98 Stat. 1987 (providing for applicability of sentencing provisions to offenses committed before Nov. 1, 1987). Since Kress was sentenced for criminal activity which commenced in 1983, the FPA supports the district court's actions. Also applicable is the VWPA, which was enacted in 1982. The VWPA states that

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[5] The FPA provides, in relevant part, that "the defendant . . . may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." 18 U.S.C. § 3651.

the "court, when sentencing a defendant under [Title 18], may order . . . that the defendant make restitution to any victim of such offense." 18 U.S.C. § 3663(a)(1). We have held that defendants may be required under the VWPA to pay restitution to federal governmental bodies as a special condition of probation. *United States v. Hand,* 863 F.2d 1100 (3d Cir. 1988).

Where the district court fails to specify whether the FPA or the VWPA authorized its actions, the general rule is that the VWPA controls. *See United States v. Miller,* 900 F.2d 919, 921-22 (6th Cir. 1990); *United States v. Padgett,* 892 F.2d 445, 448 (6th Cir. 1989) ("unless a clear intention appears to the contrary, we will assume restitution orders are made pursuant to the broader provisions of the VWPA"). *See also United States v. Spambanato,* 876 F.2d 5, 7 (2d Cir. 1989) ("for crimes committed after January 1, 1983, . . . restitution is to be awarded only pursuant to the VWPA"). This rule makes sense, given the broad provisions of the VWPA and the repeal of 18 U.S.C. §-3651. *See United States v. Padgett,* 892 F.2d at 448; *United States v. Ferrera,* 746 F.2d 908, 914 (1st Cir. 1984). Therefore, we hold that the VWPA, and not the FPA, governs this case, and we will analyze the issues accordingly.

III.

Kress first argues that post-judgment interest on restitution payments can never be assessed under the VWPA. The VWPA itself is silent with respect to the payment of interest in connection with restitution.

"However, the absence of a specific provision for interest in a statute does not necessarily 'manifest[] an unequivocal congressional purpose that the obligation shall not bear interest.'" *United States v. Sleight,* 808 F.2d 1012, 1019 (3d Cir. 1987) (quoting *Rodgers v. United States,* 332 U.S. 371, 373 (1947)). Rather, we are to "fashion the grant or denial of interest based on the congressional purpose in imposing the particular statutory obligation and in light of general relevant principles." *Id.* at 1019-20 (paraphrasing *Rodgers,* 332 U.S. at 373). Thus, if it would serve the purpose behind the statute at issue, interest may be awarded. Utilizing this test, the Supreme Court has held that interest cannot be added to a fine or penalty the purpose of which is to deter prohibited conduct, since the government does not suffer a money loss if that fine or penalty is not paid immediately. *Rodgers,* 332 U.S. at 376 (penalties incurred under the Agricultural Adjustment Act of 1938 for marketing cotton in excess of fixed quotas should not bear pre-judgment interest).

However, a restitution order under the VWPA is quite different from a fine or penalty payable to the government. The purpose of the VWPA restitution provisions is to compensate victims for their losses, not to punish the wrongdoer. *See Hughey v. United States,* __ U.S. __ 110 S. Ct. 1979, 1984-85 (1990) (summarizing congressional intent with respect to the VWPA).[6] In this

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[6] In *Hughey,* the supreme Court held that the VWPA did not authorize a restitution award for losses related to criminal conduct for which the defendant was not convicted. 110 S. Ct. at 1982. Kress argues that broad language in *Hughey* evinces

(continued...)

case, the restitution order works to compensate the government completely for losses incurred as a result of Kress's fraud. Adding interest to the principal furthers that purpose. For example, if post-judgment interest were not required and the restitution not paid promptly, the government would suffer a loss, since the government cannot earn interest on or invest the money Kress retains from his fraud. *See Sleight*, 808 F.2d at 1020 n.4. Therefore, requiring a defendant to pay interest on restitution due its victim is entirely consistent with the congressional purpose behind the VWPA and comports with the equitable principles surrounding the compensation of victims.

Wrestling with the same question, the Court of Appeals for the Fifth Circuit reached the same conclusion. *In United States v. Rochester*, 898 F.2d 971 (5th Cir. 1990), the court held that post-judgment interest on restitution owed a federal agency could be awarded pursuant to the VWPA.[7]

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[6](...continued)

the Court's intent to prohibit interest awards under the VWPA because the VWPA does not expressly authorize interest, and because "principles of lenity" demand that statutory ambiguities be resolved in favor of the defendant. However, this reading of *Hughey* goes too far. *Hughey* dealt with issues entirely different than the ones before us, and cannot reasonably be understood to apply to our case.

[7] The Fifth Circuit also held that pre-judgment interest could be awarded. Since the district court here assessed only post-judgment interest, we need not decide if pre-judgment interest can properly be awarded under the VWPA. However, we do note that the portion of the *Rochester* case dealing with pre-

(continued...)

Applying the *Rodgers/Sleight* analysis, the court reasoned that:

> restitution imposed pursuant to the VWPA . . . is not in the nature of a fine. Rather, the purpose of the VWPA is "to ensure that wrongdoers, to the degree possible, make their victims whole." This purpose is effectuated by the payment of the fine to the victim rather than the Government . . . . [T]he purpose of the VWPA would be served by the inclusion of interest in the judgment.

Id. at 983 (citation omitted). *See also United States v. Peden*, 872 F.2d 1303 (7th Cir. 1989) (while vacating a restitution order because district court did not make the requisite findings, court of appeals did not question the propriety of requiring defendant to pay accrued interest on the restitution owed).

This conclusion is further buttressed by our decision in *Sleight* in which we held that a restitution order which included post-judgment interest was permitted by the FPA. Although noting that restitution is "inherently a

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[7](...continued)

judgment interest may be in conflict with our opinion in *Sleight*, where we held *inter alia* that pre-judgment interest assessed pursuant to the FPA was illegal. *Sleight*, 808 F.2d at 1020.

criminal penalty," we stated that when reduced to judgment, restitution "does not differ in essence from a judgment arising out of civil proceedings." 808 F.2d at 1020. In other words, we viewed a judgment of restitution as a debt to a victim. *Id.* at 1020. Based on that reasoning, we found that post-judgment interest was consistent with the purpose of the FPA "to make the victim whole." *Id.* While *Sleight* interpreted the FPA, its reasoning remains persuasive since the restitution provisions of the FPA and the VWPA are similar. *See generally Spambanato,* 876 F.2d at 7 (even though district court erroneously applied FPA, same restitution award could have been imposed under VWPA).

In short, the VWPA may be silent on the issue of interest, but it is clear that a restitution order including post-judgment interest furthers the compensatory goal of that Act. Such an order is not in the nature of a fine or penalty. Given the teachings of *Rodgers, Robinson, and Sleight* in this regard, we hold that the VWPA implicitly authorized the district court to require Kress to pay post-judgment interest on restitution due the federal government.

IV.

Kress next contends that even if the VWPA authorizes as a condition of probation restitution awards which include interest, the interest should not begin accruing until the probation period begins. The VWPA does not speak to this contention, and no court has previously addressed the issue.

Lacking guidance, then, the best course is to turn to general principles espoused in *Rodgers, Robinson,*

and Sleight. In those cases, the propriety of interest depended on whether such an award served the purpose behind the relevant statutes. Since the goal of the VWPA is to fully compensate victims for their losses, it follows that interest accruing from the date of sentencing, rather than from the date probation begins, must serve a compensatory purpose.

Here, the district court's order operates to compensate the government fully for losses incurred as a result of Kress's fraud. At the moment the sentencing order was entered, the restitutionary amount became fixed and the government could define its total loss. If at that time Kress chose to pay his restitution in full, the government would have incurred no further loss. However, Kress delayed paying the restitution until he had exhausted his appeals and had served his sentence. During that time, he was in possession of money rightfully belonging to the United States. While he held that money, it was presumably bearing interest, interest that the government would have been earning were it not for Kress's fraud and his decision to delay payment. *See Sleight*, 808 F.2d at 1020 n.4. Thus, requiring interest to be computed from the instant the restitution award became certain generally provides complete compensation to the government. We therefore hold that the district court properly ordered interest on the restitution to be computed from March 14, 1989, the date of sentencing.[8]

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[8] Kress suggests that the district court did not explicitly find that he was capable of paying the restitution until the probationary period started, and that therefore, we cannot affirm the sentencing order. *See* 18 U.S.C. § 3664(a) (directing the

(continued...)

V.

Kress also objects to the rate of interest set by the district court. Pursuant to 18 U.S.C. § 3565(b)(2) and (c)(2),[9] the district court ordered that interest on the restitutionary award be computed at a rate of 1 1/2 percent monthly (18% annually). Asserting that this rate is inappropriate, Kress asks us to reduce it to 10.43%, which

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[8](...continued)

district court to make findings regarding the ability of defendant to pay restitution). This argument is without merit. In the sentencing order, the district court expressly found that Kress was capable of paying restitution, and set the amount of restitution at $300,000, *plus* interest computed from the day of sentencing. Reading the order as a whole, we can only conclude that the district court's finding on ability to pay referred to both the principal and the interest. Additionally, Kress's contention in this regard is somewhat disingenuous, given the fact that he paid the full $300,000 just two months after his release from prison. If interest can accrue prior to probation, as we hold here, Kress asserts that it cannot accrue prior to the June 5, 1989, order vacating the prison term imposed by the March 14, 1989, order. He reasons, in effect, that the June 5 order rendered the March 14 order a nullity. This argument, too, lacks merit, since the restitution portion of the March 14 order was not amended in any way by the June 5 order.

[9] Section 3565 of Title 18 applies by its terms to fines and penalties imposed in criminal cases. It was repealed pursuant to Pub.L. 98-473, Title II, ch. II, § 212(a)(2), Oct 12, 1984, 98 Stat. 1987. However, section 235 of Pub.L. 98-473 provided that 18 U.S.C. § 3565 was applicable to all crimes committed before November 1, 1987. Since Kress's criminal activity took place between 1983 and 1987, section 3565 is relevant to the present proceeding.

was the rate applicable to civil judgments at the time of sentencing. 28 U.S.C. § 1961. Kress's present complaint with respect to the rate of interest which may permissibly be levied on the restitution payment was first raised in a Rule 35(a) motion filed on April 14, 1989. On June 5, 1989, the district court vacated the 366 day prison term to which Kress had been sentenced and substituted a four month term of imprisonment in its place. The court's order explicitly mentioned the terms as to restitution and the interest payable thereon, even though those terms remained as specified in the original order. While the court did not state that its order was in response to Kress's motion of April 14, 1989, it could not have been otherwise. *United States v. Jasper,* 481 F.2d 976, 979 (3d Cir. 1973) (proximity in time between defendant's Rule 35 motion and the district court's order suggests order was in response to defendant's motion although the order did not so state). Kress took no appeal from the district court's June 5, 1989 ruling.

Upon his release from prison, Kress filed a motion for Modification of Conditions of Probation under Rule 32.1(b) and this appeal was denominated by Kress as an appeal from the district court's denial of a Rule 32.1(b) motion. However, we have determined that Kress's motion is more properly viewed as one brought pursuant to Rule 35(a).[10] Under the former version of Fed. R. Crim. P. 35(a), which applies in this case, courts are authorized to correct illegal sentences "at any time." However, even viewing Kress' present motion as brought pursuant to Rule

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[10] *See supra* note 4.

35(a) rather than Rule 32.1(b), we must decide whether former Rule 35(a) allows a defendant to bring successive motions complaining of the exact same "illegality." We hold that because Kress failed to appeal from the June 5, 1989 order of the district court denying his motion with respect to the issue of the statutory rate of interest, that issue is now res judicata and Kress cannot relitigate the same issue two years later in the form of a second Rule 35 motion,

Fed. R. App. P. 4(b) provides that the notice of appeal in a criminal case is to be filed within ten days of the entry of the judgment or order appealed. The timely filing of such a notice is mandatory and jurisdictional. *United States v. Grana,* 864 F.2d 312,314 (3d Cir. 1989); *Rothman v. United States,* 508 F.2d 648, 651 (3d Cir. 1975). The requirements of Fed. R. App. P. 4(b) apply to all criminal appeals, including denials of Rule 35 motions. *United States v. Anna,* 843 F.2d 1146, 1147 (8th Cir. 1988). Therefore, the failure of Kress to appeal from the district court's June 5, 1989 order regarding his Rule 35 motion results in the issues resolved by that order being res judicata in the future processing of this case.

We could only decide the issue of the applicable rate of interest on this appeal if we accept Kress's conclusion that he was free to bring successive Rule 35 motions on the same issues in the district court, thereby allowing him to bypass the normal rules of appellate procedure, rather than filing a timely appeal from the order responding to his first Rule 35 motion. We cannot accept this premise.

The repetition of motions under former Rule 35(a) is somewhat analogous to successive habeas corpus proceedings but principles of res judicata do not strictly apply in the habeas corpus setting. Title 28 U.S.C. section 2255 provides that "[a]n appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." The statute also provides that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." *Id.* Under that provision of section 2255, the court's ruling on the first motion is not considered res judicata. Instead, it is within the discretion of the district court to refuse to entertain a second or successive motion for similar relief. *Gant v. United States,* 308 F.2d 728 (5th Cir. 1962); *United States v Quon,* 241 F.2d 161, 164 (2d Cir.), *cert. denied,* 354 U.S. 913 (1957).

While the doctrine of res judicata does not strictly apply in the habeas corpus setting, "an abusive use of the writ may be prevented and a prior refusal to discharge on a like application may be made the authority for a refusal on subsequent ones." *Wells v. United States,* 158 F.2d 833, 834 (5th Cir.), *cert. denied,* 331 U.S. 852 (1947). As noted by this court in *United States v. Lieby,* 820 F.2d 70 (3d Cir. 1987), in the context of section 2255, allowing petitioners the right to bring successive motions on the same grounds "would effectively grant prisoners *cartes blanches* to flout the rules of habeas corpus procedure." *Id.* at 74. A petitioner who failed to timely appeal a district court's denial of his first petition motion could simply file a second petition and then appeal the trial court's denial of his second petition.

As we stated in *Lieby,* "[w]e refuse . . . to allow through our back door what could not enter through our front door" *Id.*

The provisions of the former Rule 35(a) would, if read literally, allow a defendant to move to correct his sentence "at any time," regardless of the grounds for his prior motions or the required time within which to appeal adverse decisions. While this and other courts of appeals have concluded that subsequent section 2255 motions raising the same legal grounds are not barred as a matter of res judicata, we have previously noted that principles of res judicata do apply when successive Rule 35 motions are brought.

In *Jasper,* the defendant filed an initial Rule 35 motion for correction of his sentence. Approximately six weeks later, the district court issued an order vacating his sentence and correcting it with respect to provisions other than those about which the defendant had complained. The defendant failed to take an appeal from the court's order and after the time for filing an appeal had expired, filed a second Rule 35 motion containing the same application as had the first. 481 F.2d at 979. On appeal, we stated that "[t]o the extent that the order appealed from rejects a rule 35 motion identical to that which the court acted on [previously], it is, on the ground of res adjudicata, correct."[11] *Id.* at 979-80.

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[11] Ultimately the court did entertain the appeal, noting that the proceedings were brought pursuant to Rule 35 and § 2255 and that "principles of res adjudicata have only limited application" to § 2255 proceedings. 481 F.2d at 980. The court concluded

(continued...)

This case presents a similar situation. Kress raised the issue of the rate of interest in his first Rule 35 motion and failed to appeal from the court's order dated June 5, 1989. In an attempt to avoid the repercussions of his failure to appeal the June 5, 1989 order, he brings the same issue in a second motion. Under principles of res judicata, Kress is precluded from relitigating the proper rate of Interest.

VI.

Finally, Kress argues that the accrual of interest during the pendency of his appeal impermissibly burdens his right to appeal. Interest began to accrue on the principal Kress owed the government on March 14, 1989, and it continued to accrue while Kress appealed his conviction. Indeed, the record shows that $60,000 of interest was added to the original restitution award before the Supreme Court denied certiorari. Kress reasons that this additional financial burden both Interfered with his appeal and penalized him for pursuing that appeal.

It is true that the government cannot punish a defendant for appealing his case or otherwise restrict the avenues of a defendant's appeal where, as here, there is a right to appeal. *See generally North Carolina v. Pearce,* 395 U.S. 711, 724(1969). *Cf. Reisman v Caplin,* 375 U.S. 440 (1964); *Oklahoma Operating Co. v. Love,* 252 U.S 331 (1920); *St. Louis, Iron Mountain and Southern Railway Co.*

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[11](...continued)
that the "statutory form of res adjudicata" set forth in § 2255 did not apply and relief was available pursuant to § 2255. *Id.*

v. Williams, 251 U.S 63 (1919); *Ex parte Young*, 209 U.S 123 (1908) (due process is violated if threat of severe penalties may deter party from seeking judicial review of administrative agency's decision). To do so constitutes a violation of due process. However, there is no indication in the record that Kress brought this issue to the attention of the district court or otherwise preserved it for appeal. Consequently, he can only secure relief if the district court committed "plain error" within the meaning of Fed. R. Crim P. 52(b). The "plain error" doctrine "authorizes the Courts of Appeals to correct only particularly egregious errors, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Thame*, 846 F.2d 200, 204 (3d Cir.), *cert. denied*, 488 U.S. 928 (1988) (citation omitted). Given the circumstances of this case, it cannot be said that the district court committed plain error, or for that matter, committed any error, in assessing interest against Kress.

The scheme embodied in the VWPA requires district courts to make findings on ability to pay before ordering restitution. See 18 U.S.C. § 3664(a) (court must consider "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate."). This requirement ensures that a defendant will be able to pay restitution, and also ensures that restitution payments will not unduly limit his right to appeal. Thus, If the district court did not make findings on Kress's ability to pay, we would have to vacate the restitution order and remand the case. If the district court's finding were erroneous and somehow impaired Kress's right to appeal, a similar result would ensue. It Is clear, then,

that the VWPA provides defendants like Kress all the process they are due by guaranteeing procedures to protect their rights. Due process requirements are therefore met as long as the district court makes findings regarding ability to pay, and as long as those findings are not tainted by error.

Upon sentencing Kress and ordering restitution, the district court found that Kress could afford to pay $300,000 in restitution, and could afford to pay eighteen percent interest on the principal, with that interest to begin accruing immediately. In his April 19, 1989, Rule 35 motion, Kress asserted that he did not have the financial ability to pay the added interest, but did not offer any evidence to call into question the district court's earlier finding. The motion was denied without a hearing. On appeal, Kress has similarly failed to demonstrate an inability to pay restitution plus interest or any interference with his right to appeal. To the contrary, Kress appealed his conviction up to the Supreme Court and paid the full amount of restitution without interest shortly after his release from prison, suggesting that he at all times could afford to pay restitution and could absorb the cost of his appeals. There is nothing to indicate that the interest unduly burdened Kress's right to an appeal.

VII.

To summarize, we hold that a district court, upon making findings regarding a defendant's ability to pay restitution, may order that defendant to pay restitution, along with interest, pursuant to the VWPA. Interest may begin to accrue the day the restitution order is entered. Because Kress failed to appeal from the district court's June 5, 1989

order regarding his first Rule 35 motion, Kress cannot now seek to relitigate the applicable rate of interest. Since the district court's sentencing order in the present case conforms with law and is not based on erroneous findings, we will affirm the order of the district court in all respects.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 88-00271
v.	:	
GERALD KRESS	:	

ORDER

AND NOW, this 8th day of March, upon consideration of defendant's Motion to Modify the Court's Judgment and Commitment Order, and the government's response thereto, it is hereby ORDERED that the motion is DENIED.

BY THE COURT:

/s/ R. J. Broderick
J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1237

UNITED STATES OF AMERICA

v.

GERALD KRESS,

Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge; BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and WEIS*, Circuit Judges

The petition for rehearing filed by appellant in this case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: Oct. 18, 1991

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* As to panel rehearing.

(2)

No. 91-837

In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD KRESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under principles of *res judicata*, petitioner's failure to appeal the denial of a motion pursuant to former Fed. R. Crim. P. 35 barred him from obtaining appellate review of the denial of a subsequent Rule 35 motion that raised the same issue as the first motion.

2. Whether the interest rate set by the sentencing court in an order of restitution that deferred payment of the amount owed impermissibly burdened petitioner's right to appeal, in violation of the Due Process Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and rules:

Statutes and rules—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-837

GERALD KRESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 944 F.2d 155.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1991. A petition for rehearing was denied on October 18, 1991. Pet. App. 23a-24a. The petition for a writ of certiorari was filed on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of 13 counts of mail fraud, in violation of 18 U.S.C. 1341; 20 counts of making false statements to a government agency, in violation of 18 U.S.C. 1001; 21 counts of filing false claims, in violation of 18 U.S.C. 287; and five counts of paying gratuities to a public official, in violation of 18 U.S.C. 201(f). He was sentenced to a prison term of a year and a day, to be followed by five years' probation. C.A. App. 45a-47a. As a condition of his probation, he was ordered to pay the government $300,000 in restitution. *Ibid.* Petitioner appealed, challenging only his conviction. The court of appeals affirmed. *United States* v. *Educational Development Network Corp.*, 884 F.2d 737 (3d Cir. 1989), cert. denied, 494 U.S. 1078 (1990).[1] Thereafter, petitioner moved the district court under Fed. R. Crim. P. 32.1(b) to modify the terms of his probation. The district court denied the motion. Pet. App. 4a-5a. The court of appeals affirmed. Pet. App. 1a-21a.

1. Between 1983 and 1987, petitioner and EDN had a contract with the Department of Defense to provide an educational and employment training program to the Army National Guard Bureau. *United States* v. *Educational Development Network Corp.*, 884 F.2d at 738; Pet. App. 13a n.9. The indictment

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[1] Petitioner and Educational Development Network Corporation (EDN), which was wholly owned by petitioner, were jointly indicted. Pet. App. 3a n.1. Like petitioner, EDN pleaded guilty to the indictment. The district court imposed a fine of $100,000 on EDN. C.A. App. 48a-50a.

to which petitioner pleaded guilty arose from his submission of inflated estimates of EDN's costs under the contract and from his payment of illegal gratuities to the Guard's contract officer responsible for approving those costs. 884 F.2d at 739.

2. The district court found that the government "suffered actual damage and loss" of $300,000 as a result of petitioner's fraud. C.A. App. 23a-24a. Based upon the presentence report and testimony at the sentencing hearing, the court further found that petitioner "ha[s] the financial capacity to pay the restitution * * * within the period of probation." *Id.* at 24a. The court made the $300,000 payable in 60 monthly installments, with payment to begin upon commencement of petitioner's probation. Interest on the unpaid balance was to begin accruing on the day of sentence—March 14, 1989—and was to be "computed at the rate of 1.5 per cent a month as provided in 18 [U.S.C.] 3565." *Ibid.*[2]

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[2] Former 18 U.S.C. 3565, which governed the collection and payment of fines and penalties, was repealed by the Act of Oct. 12, 1984, Pub. L. No. 98-473, Tit. II, ch. II, § 212(a)(2), 98 Stat. 1987. Section 235 of Pub. L. No. 98-473 makes former 18 U.S.C. 3565 applicable to offenses committed before November 1, 1987. *See* 18 U.S.C. 3551 note.

Former 18 U.S.C. 3565(b)(2) provided:

> If the judgment specifies other than immediate payment of a fine or penalty, the period provided for payment shall not exceed five years, excluding any period served by the defendant as imprisonment for the offense. The defendant shall pay interest on any amount payment of which is deferred under this paragraph. The interest shall be computed on the unpaid balance at the rate of 1.5 percent per month for each full calendar month for which such amount is unpaid.

3. On April 14, 1989, while his appeal of his conviction was pending,[3] petitioner moved the district court pursuant to former Fed. R. Crim. P. 35[4] to reduce the interest rate on the restitution to 10.43 per cent annually, the rate of interest allowable under 28 U.S.C. 1961 for civil judgments at the time of petitioner's sentencing. Pet. App. 4a, 14a; C.A. App.

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[3] Petitioner was free on bail pending appeal (Pet. 9) and pending this Court's disposition of his first petition for certiorari (Pet. 10).

[4] The version of Fed. R. Crim. P. 35 applicable to offenses, such as petitioner's, that were committed before November 1, 1987, provided in pertinent part:

> Correction or Reduction of Sentence.
>
> (a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.
>
> (b) Reduction of Sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction * * *.

Former Rule 35 was amended by Pub. L. No. 98-473, Tit. II, § 215(b), 98 Stat. 2015, and by Pub. L. No. 99-570, Tit. X, § 1009, 100 Stat. 3207-8. Current Rule 35 sharply limits a district court's authority to correct or reduce sentences. Subsection (a) of the Rule permits correction of a sentence only upon remand from a court of appeals. Subsection (b) permits reduction of a sentence for changed circumstances upon motion by the government. Subsection (c) permits correction of a sentence imposed as a result of arithmetical, technical, or other clear error within seven days after the imposition of sentence.

55a-59a. On June 5, 1989, the district court vacated petitioner's 366-day prison term, substituting a prison term of four months. In addition, the court reiterated the terms of its restitution order, including the applicable rate of interest. Pet. App. 4a, 12a n.8, 14a; C.A. App. 51a-53a, 69a-71a. Petitioner did not appeal that ruling. Pet. App. A14.[5]

4. On April 19, 1980, three days after this Court denied his first petition for certiorari, petitioner filed a second Rule 35 motion. Pet. App. 4a. In that motion, petitioner asked the court to vacate his four-month prison term and to set aside the restitution order in light of a civil action that the government had filed against him. See Memorandum in Support of Motion at 3-13. Petitioner also claimed that he was unable to pay the interest on the restitution, but he offered no evidence on that point. Pet. App. 20a. The district court denied the motion. Pet. App. 4a, 20a. Petitioner then served his prison term and was released on October 2, 1990. Pet. App. 4a. Petitioner paid $300,000 in restitution on December 18, 1990. Gov't C.A. Br. 4.

5. On January 2, 1991, petitioner filed a pleading entitled "Motion for Modification of Conditions of Probation" under Rule 32.1(b). Pet. App. 4a, 14a; C.A. App. 6a, 66a-68a. In the motion, petitioner stated that the United States Attorney had demanded that

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[5] Petitioner states (Pet. 10) that he "formally withdrew his Rule 35 Motion without prejudice on June 20, 1989," *i.e.*, five days after his time to file a notice of appeal expired. See Fed. R. App. P. 4(b). The district court's docket sheet for 1989 contains the following entry for June 20, 1989: "Praecipe to remove without prejudice, deft's motion pursuant to rule 35, cert. of service, filed." C.A. App. 5a. There is no subsequent entry on this matter.

he pay pre-probation interest totaling approximately $95,000. Pet. App. 5a n.3. Petitioner asked the court to modify or clarify its sentencing order to reflect that interest on the restitution did not begin to accrue until his release from prison. Pet. App. 4a-5a. On March 12, 1991, the district court denied the motion. Pet. App. 5a; C.A. App. 81a. Petitioner appealed the denial of the motion.

6. The court of appeals affirmed. Pet. 1a-21a. As an initial matter, the court held that the Victim and Witness Protection Act (VWPA), 18 U.S.C. 3663-3664, implicitly authorized the district court to require petitioner to pay post-judgment interest on the restitution that he owed the government. Pet. App. 6a-11a. The court also ruled that the district court had properly ordered the interest to be computed from the date that petitioner was sentenced, rather than—as petitioner had contended—from the date that he began serving his probation. Pet. App. 11a-12a.

The court of appeals also held that principles of *res judicata* barred petitioner's claim that the district court had erred in setting a rate of interest in excess of the rate applicable to civil judgments at the time he was sentenced. Pet. App. 13a-18a. Treating petitioner's Rule 32.1(b) motion as one brought under Rule 35(a) (Pet. App. 5a n.4, 14a),[6] the court reasoned that petitioner had failed to appeal the denial of his first Rule 35 motion, in which he had raised the identical claim, and that he filed the second mo-

[6] The court explained that petitioner's purported Rule 32.1(b) motion "directly challenged the legality of the sentencing order," while Rule 32.1(b) simply provides a vehicle for clarifying the conditions of probation or modifying them because of changed circumstances. Pet. App. 5a n.4.

tion "in an attempt to avoid the repercussions of his failure to appeal." Pet. App. 18a. The court stated that it would "refuse * * * to allow through our back door what could not enter through our front door." Pet. App. 17a. Accordingly, the court held that petitioner "cannot relitigate the same issue two years later in the form of a second Rule 35 motion." Pet. App. 15a.

Finally, the court rejected petitioner's claim that the accrual of interest while his appeal was pending impermissibly burdened his right to appeal. Pet. App. 18a-21a. Because petitioner had failed to raise the issue in the district court, the court reviewed the claim for plain error. Pet. App. 19a. The court determined that the district court had not committed any error, let alone plain error, in assessing interest at the statutory rate against petitioner during his appeal. *Ibid.* The court explained that the VWPA "provides defendants like [petitioner] all the process they are due by guaranteeing procedures to protect their rights," and that the district court had complied with the VWPA. Pet. App. 20a. In particular, the court noted, 18 U.S.C. 3664(a) required the district court to consider "the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate" in fashioning an order of restitution. Pet. App. 19a. Observing that the district court had found that petitioner could afford to pay $300,000 in restitution and 18 per cent interest on the principal, the court stated that petitioner had

> similarly failed to demonstrate an inability to pay restitution plus interest or any interference with his right to appeal. To the contrary, [pe-

> titioner] appealed his conviction up to the Supreme Court and paid the full amount of restitution without interest shortly after his release from prison, suggesting that he at all times could afford to pay restitution and could absorb the cost of his appeals.

Pet. App. 20a. The court concluded that "[t]here is nothing to indicate that the interest unduly burdened [petitioner's] right to an appeal." *Ibid.*

ARGUMENT

Petitioner does not challenge the district court's authority under the Victim and Witness Protection Act to assess interest on the restitution he owed the government pending his appeal. Nor does petitioner challenge the district court's authority to order that the interest accrue from the date of sentence. Instead, petitioner contends (Pet. 14-17) that to the extent that the 18 per cent interest rate set by the district court exceeded the "market" rate of interest,[7] it was punitive rather than compensatory and burdened his right to appeal, in violation of the Due Process Clause. As the court of appeals correctly ruled, however, petitioner's failure to appeal the district court's June 5, 1989, order denying his first (April 14, 1989) motion under former Rule 35 in

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[7] Petitioner does not identify the particular market that he would use as the standard for determining "market" rate. By providing for a specific statutory rate of interest in former 18 U.S.C. 3565(b)(2), Congress avoided the problems that would have been created had the court been forced to determine what "market" to use in setting the rate for use in restitution orders, and how to treat changes in that "market rate" during the period between the offense (from which the restitutionary obligation had its origins) and the ultimate satisfaction of the obligation.

which he challenged the interest rate barred him, under principles of *res judicata*, from obtaining appellate review of the district court's March 12, 1991, order denying his second (January 2, 1991) motion in which he raised the same issue. In any event, petitioner's claim lacks merit. Accordingly, review by this Court is not warranted.

1. Petitioner challenges (Pet. 17-22) the court of appeals' refusal to review his challenge to the rate of interest on two grounds. First, he claims that the district court's June 5, 1989, order did not dispose of that portion of his first motion in which he challenged the interest rate. In petitioner's view, the order "had to do only with the length of defendant's incarceration, an issue not raised in the April 1989 motion." Pet. 18. Second, petitioner argues that the principles of *res judicata* do not apply to Rule 35 motions in any event. Both arguments are unavailing.

a. As the court of appeals recognized (Pet. App. 14a), "[w]hile the [district] cour did not state that its [June 5, 1989] order was in response to [petitioner's] motion of April 14, 1989, it could not have been otherwise." That order, entitled "Amended Judgment in a Criminal Case," vacated the original judgment in the case and entered a new judgment. C.A. App. 51a-53a, 69a-71a. In addition to reducing petitioner's prison term to four months, the district court reiterated its earlier finding that the government had "suffered actual damage or loss" in the amount of $300,000 as a result of petitioner's crimes, that petitioner had the ability to pay restitution in that amount, and that interest should be assessed on the restitution amount at the rate of 1.5 per cent per month from the date of the original sentence. *Ibid.* The court of appeals correctly ruled that the district court's June 5 order constituted a partial grant and

a partial denial of petitioner's April 14 motion, and further review of the adequacy of that ruling would in any event be unwarranted.

b. "The federal courts have traditionally adhered to the * * * doctrine[] of res judicata," under which "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). The district court's June 5, 1989, order denying the interest rate claim that petitioner raised in his first motion under former Rule 35 was a final judgment on the merits. Having failed to appeal that ruling, petitioner could not relitigate the issue on an appeal from the district court's denial of a subsequent Rule 35 motion.

Petitioner contends (Pet. 18-19) that this Court's decision in *Heflin* v. *United States*, 358 U.S. 415 (1959), "squarely establishes" that *res judicata* principles do not apply to Rule 35 motions. We submit that that contention is incorrect. In *Heflin*, this Court held that relief under 28 U.S.C. 2255 was unavailable to a prisoner who, while in custody under a valid sentence, sought to attack a sentence that he had not yet begun to serve. 358 U.S. at 418. The Court, however, treated the prisoner's motion as one for relief under former Rule 35 and entertained it even though the petition for certiorari—while timely filed for an independent civil suit under Section 2255—was untimely filed for a Rule 35 motion, which is made in the original, criminal case. 358 U.S. at 418 n. 7.[8] In a footnote, the Court explained that, "because successive

[8] At the time *Heflin* was decided, the time for filing a petition for a writ of certiorari in a criminal case was 30 days under the Rules of this Court, while the time for filing a petition in a civil case was 90 days under 28 U.S.C. 2101(c). See *Heflin*, 358 U.S. at 418 n.7.

motions may be made under Rule 35 and because no jurisdictional statute is involved, the majority agrees to dispense with the requirements of our Rule [as to timely filing] in order to avoid wasteful circuitry." *Ibid.* It is that language that petitioner seizes upon for the proposition that *res judicata* principles are inapplicable to Rule 35 motions. But the language does not establish that proposition.

The *Heflin* footnote does not state a general rule precluding any application of the doctrine of *res judicata* to Rule 35 motions. The footnote simply states the basis for the Court's decision to dispense with the non-jurisdictional time requirement for filing a petition for certiorari in a criminal case. The footnote does not mention the doctrine of *res judicata*, and it seems unlikely that by referring to the permissibility of successive Rule 35 motions, the Court meant to suggest that *res judicata* principles have no application in the Rule 35 setting. At most, the footnote suggests that the Court may have believed that an exception to the doctrine of *res judicata* would have been applicable on the highly unusual facts of that case.[9]

The general issue of the application of *res judicata* in Rule 35 cases was neither briefed nor argued in *Heflin*,[10] and petitioner cites no decision of any court

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[9] The petitioner in *Heflin* had originally filed his motion under both 28 U.S.C. 2255 and Rule 35. See Brief for the United States at 12-13. His petition for a writ of certiorari was timely insofar as it was filed in a Section 2255 civil proceeding, but untimely insofar as it was filed in a Rule 35 proceeding. The question whether a Section 2255 remedy was available in the circumstances of his case was apparently an unsettled question until this Court's decision in *Heflin* itself. See 358 U.S. at 418.

[10] The Brief for the United States in *Heflin* "recognize[d] * * * that if petitioner should properly prevail under Rule 35,

that has construed the *Heflin* footnote as he does. Moreover, any determination that *res judicata* does not apply to Rule 35 motions in the circumstances of this case would conflict with Fed. R. App. P. 4(b), which provides that the notice of appeal in a criminal case is to be filed within ten days of the entry of the judgment or order appealed. That time limit is mandatory and jurisdictional, and it applies to all criminal appeals, including appeals of denials of Rule 35 motions. See *United States* v. *Anna*, 843 F.2d 1146, 1147 (8th Cir.), on appeal after remand, 863 F.2d 31 (8th Cir. 1988); *United States* v. *Naud*, 830 F.2d 768, 769 (7th Cir. 1987). Rule 4(b) would be effectively nullified as to Rule 35 motions if it could be circumvented as easily as petitioner suggests, *i.e.*, simply by filing another Rule 35 motion.[11]

To be sure, a few courts of appeals have suggested that because former Rule 35 allowed the correction of an illegal sentence at any time, the doctrine of *res judicata* is inapplicable to motions under the Rule. See, *e.g.*, *United States* v. *Mazak*, 789 F.2d 580, 581 (7th Cir. 1986); *United States* v. *Quon*, 241 F.2d 161, 163-164 (2d Cir.), cert. denied, 354 U.S. 913 (1957); *Ekberg* v. *United States*, 167 F.2d 380, 384 (1st Cir. 1948). Any conflict between those decisions and

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the same issue [whether the sentence petitioner had not yet begun to serve was valid] could be raised by a new motion under that rule, and to that extent the question is not academic at this time." Br. at 12.

[11] Cf. *United States* v. *Ursillo*, 786 F.2d 66, 71 (2d Cir. 1986) (even assuming that Fed. R. Crim. P. 32 gave district court jurisdiction to consider challenge to presentence report over a year after sentence was imposed, defendant would not be allowed to relitigate issue where district court had previously denied Rule 35 motion raising same issue and defendant had not appealed that denial).

the ruling below is of no continuing importance, however, in light of the amendment to Rule 35 eliminating the provision that a district court may correct an illegal sentence at any time.[12]

2. Petitioner's challenge to the rate of interest provided for in the restitution order (Pet. 14-17) lacks merit in any event. It is true, as the court of appeals recognized (Pet. App. 18a-19a), that due process precludes a sentencing court from punishing a defendant for pursuing an appeal. *North Carolina* v. *Pearce*, 395 U.S. 711, 724 (1969). As the court ruled, however, petitioner received "all the process [he was] due" (Pet. App. 19a-20a), by virtue of the district court's careful compliance with the VWPA's requirement (18 U.S.C. 3664(a)) that it assess his ability to pay in fashioning a restitution order, and by the district court's determination that petitioner "could afford to pay $300,000 in restitution, and could afford to pay eighteen per cent interest on the principal, with that interest to begin accruing immediately." Observing that in the district court petitioner "did not offer any evidence to call [that finding] into question" (Pet. App. 20a), the court of appeals correctly noted that on appeal petitioner "similarly failed to demonstrate

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[12] The lack of continuing importance of the court of appeals' *res judicata* determination also disposes of petitioner's suggestion that this Court should grant review in order to consider whether to treat successive motions under former Rule 35 like successive habeas corpus petitions, to which the doctrine of *res judicata* is not strictly applicable. See *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1462-1467 (1991). On this point it is sufficient to note that the relationship between habeas corpus and *res judicata* is sui generis. It was precisely because denials of the writ were not reviewable at all at common law that they were held not to bar renewed applications for the writ. *Id.* at 1462.

an inability to pay restitution plus interest or any interference with his right to appeal." *Ibid.* That fact was particularly significant because the interest rate that petitioner was assessed was far from confiscatory; it was only a few percentage points higher than what he himself identified as the "market" rate. Accordingly, the court of appeals was correct in concluding (*ibid.*) that petitioner "at all times could afford to pay restitution and could absorb the cost of his appeals," and that "[t]here is nothing to indicate that the interest unduly burdened [his] right to an appeal." [13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] Petitioner argues (Pet. 16) that the ruling below is inconsistent with *Hughey* v. *United States*, 110 S. Ct. 1979 (1990). As petitioner acknowledges (Pet. 16), however, in *Hughey* this Court held that the VWPA authorizes restitution only for losses caused by the specific conduct that is the basis for the offense of conviction, as opposed to losses related to other alleged offenses. 110 S. Ct. at 1981. *Hughey* does not address the question of the rate of interest that may be assessed on restitution awarded under the VWPA.

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